LAW AND THE DEVELOPMENTALLY DISABLED

JOHN ALBRECHT

Made Possible by a Grant from the Lewis and Clark County Association for Retarded Citizens and the Montana Developmental Disabilities Planning and Advisory Council.

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INTRODUCTION

This manual is a compilation of materials prepared for a series of public workshops on the Law and the Developmentally Disabled. The workshops were held to train people with developmental disabilities, their relatives and friends, volunteer advocates and people who work with the developmentally disabled to be better advocates. People can be effective advocates when they know the rights of the developmentally disabled.

The workshops were designed for non-lawyers. The idea was that non-lawyers can advocate in everyday situations without the help of a lawyer. For example, the parent of a disabled child can adequately represent the child's interests in a child study team meeting of a special education program. Nevertheless, the parent must know that a child study team meeting should be held and what questions are to be addressed at that meeting. The workshops were designed to teach people those rights which can be exercised without resorting to the legal system.

In addition, the workshops were designed to encourage people to seek the help of an attorney when necessary. Bureaucracies are confusing and often difficult for people to work with. Further, no person should attempt to deal with certain problems (for example, estate planning) without the help of an attorney. I have tried to teach people to recognize problems for which an attorney should be consulted.

As this manual is a compilation of all of the materials from the workshops, it serves the same function. It is designed for non-lawyers to help them advocate for the developmentally disabled. Further, it should be of help to the person who must decide whether or not she/he needs an attorney.

Finally, it may be useful to attorneys as a starting point to helping developmentally disabled clients and parents and relatives of developmentally disabled persons. A bibliography is provided of the laws and cases used herein, at the end of the manual. These will help attorneys find the laws which they need.

The workshops were held in Helena, Butte and Bozeman, Montana, from March, 1978, to August, 1978. Prior to holding the workshops, public meetings were held to solicit suggestions for topics for the workshops. The workshops were open to the public, free of charge. They were made

possible by a grant from the Lewis and Clark County Association for Retarded Citizens and the Montana Developmental Disabilities Planning and Advisory Council.

The workshops were based upon Montana law and federal law at that time. Certainly, the laws are always changing and when they do, this booklet will be outdated. Nevertheless, many of the laws will remain the same or similar and this booklet will remain useful.

I. RIGHTS OF DEVELOPMENTALLY DISABLED CHILDREN TO AN EDUCATION

A. SPECIAL EDUCATION SERVICES

To whom must Special Education be provided?

Montana law provides that certain educational services be provided handicapped children. A handicapped child is one who is found to be mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, emotionally disturbed, orthopedically impaired, other health-impaired or as having specific learning disabilities. Education must be provided to meet the unique needs of such a child.

As of September 1, 1977, school must be provided to all handicapped children ages 6 to 18, inclusive. As of September 1, 1980, school must be provided to all handicapped children ages 3 to 21, inclusive.

Two basic concepts must be met by a program for any handicapped child. First, the child must be provided a free, appropriate, public education. Second, that education must be provided in the least restrictive educational environment.

What is a free, appropriate, public education?

The concept of a free, appropriate, public education has a basis in the United States Constitution. In *Pennsylvania Association for Retarded Citizens v. Commonwealth of Pennsylvania*, 344 F.Supp. 1257 (E.D. Pa 1971), the parties agreed that the state was obligated to provide an education to mentally retarded children since an education was provided to non-mentally retarded children. *Mills v. Board of Education of District of Columbia*, 348 F.Supp 866 (D.D.C. 1972), extended this obligation to all handicapped children. Further *Mills* held that if sufficient funds were not available to provide all needed programs, then the funds available must be spent fairly so that no child is entirely excluded from school.

The Montana Constitution of 1972 requires that the state establish a system of free, quality, public elementary and secondary schools, Article X, Section 1(3). Further, it guarantees an equal educational opportunity to all children, Article X, Section 1(1).

Special education of handicapped children is provided by state law, Section 75-7801 et.seq., Revised Codes of Montana, 1947. The funds for the local special education programs are provided by the state. The costs which are paid by the state are stated in Section 7813.1, R.C.M. 1947. The services which are described below are to be provided

to a parent free of charge.

Special education is education or training to meet the unique needs of handicapped children. It includes speech pathology, audiology, occupational and physical therapy. Further, related services must be provided if they are needed for a child to benefit from special education. Related services are transportation, psychological services, recreation, counseling services and medical services for diagnostic and evaluation services.

If a local district cannot provide the educational services which a child needs, then the child must be placed in an out-of-district school at no cost to the parents. In those situations, the room, board and educational costs of the child's placement must be paid by special education funds. The Board of Trustees must recommend the out-of-district placement and the Superintendent of Public Instruction must approve it.

Costs not related to education will not be paid by special education funds. Specifically, the cost of psychiatric or medical treatment need not be covered by special education funds, *Doe v. Colberg*, 555 P2d 753, 33 St. Rep. 1008 (1976).

What is an appropriate education is a more difficult question. The term "appropriate" is not defined. Nevertheless, parents may have certain concerns which may be addressed under this idea.

Specifically, parents may raise issues such as the age of the children who attend school with their child, the facility where the child attends school and the length of the school day. The special education rules seem to support the concept that a child should be educated with his/her peers. For example, Section 42-2.18(18)-S18370, Administrative Rules of Montana, requires that a child in an ungraded program be promoted from the elementary to the high school in the school year after the child reaches his/her 14th birthday. Further, one case on the subject states, "It is imperative that every child receive an education with his or her peers insofar as it is at all possible". *Hairstow v. Drosick*, 423 F.Supp. 180 (S.D.W. Va. 1976).

Section 75-7403, R.C.M. 1947, requires a school to offer a minimum school day of two hours for kindergartens, four hours for grades 1 through 3 and six hours for grades 4 through 12. The Freedom from Discrimination Act (Section 64-301 et.seq.) prohibits discrimination by handicap in education. A school system must offer the same length of school day to a handicapped child as it would if the child was in the regular program.

A physical education program must be available to all handicapped children. The child should be enrolled in a regular physical education program unless the child needs a specially designed physical education program. A specially designed program must be prescribed in the individualized educational program.

Non-academic services and extracurricular activities must be offered so as to afford the handicapped an equal opportunity to participate. This includes counseling, athletics, transportation, health services, recreational activities and special interest clubs, recess and meals.

The failure to offer the program set forth in the individualized education program would be the failure to provide an appropriate education. Also, the failure to provide a certain aspect of a program would be inappropriate. For example, the evaluation team may say the child needs one-half hour per day of speech therapy. If the school only provides one-half hour every other day, then that is inappropriate.

Nevertheless, the failure of a child to meet the goals of the individualized educational plan does not mean the plan was inappropriate. A plan should set out very specific goals. If a child does not meet those goals, the school cannot be held accountable.

What is the least restrictive educational environment?

"To the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, shall be educated with children who are not handicapped. Separate schooling or other removal of handicapped children from the regular educational environment may occur only when the nature of severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily". Section 75-7805, R.C.M. 1947. A similar statement is found in federal law, Public Law 94-142, 20 U.S.C. §1412(5).

To provide the least restrictive environment, a school must offer alternative placements. The concept of least restrictive environment is illustrated as follows:

Regular Classroom

Regular Classroom with Itinerant Teachers

Regular Classroom with a Resource Room

Special (Self-Contained) Class

Special (Day) Schools

Home Instruction

Residential School

Hospital

The top of this chart is the least restrictive. The bottom is the most restrictive. A child should be moved from the less restrictive to the more restrictive no further than necessary for the education of the child. The decision as to what is necessary for the education of the child must be determined on an individual basis. Further, the decision to place must be reviewed at least annually so as to provide for the child's return to the regular class as soon as possible.

The least restrictive environment is the school setting which is most like the situation in which a non-handicapped child would be taught. It is the answer to the question, "Where will the child be taught?"

The school that the child attends is addressed by the concept of least restrictive environment. The educational program must be provided in the school where the child would otherwise attend. The only exception to this is if the program needs of the child requires that the child attend a different school. If the child must attend another school, then the program must be provided as close as possible to the home.

Non-academic programs are addressed also. The programs include meals, recess and the non-academic programs listed above. A handicapped child must participate in these programs to the maximum extent appropriate to the needs of the handicapped child. For example, the individualized education program may say the handicapped child shall sit at the same table with non-handicapped children during lunch.

B. IDENITIFICATION, EVALUATION AND PLACEMENT OF DEVELOPMENTALLY DISABLED CHILDREN INTO SPECIAL EDUCATION PROGRAMS

What must a school system do before it may evaluate a child to determine the need for special education?

If a school wants to evaluate a child because the child may need special education services, then the school must notify the parents in writing. The notice must be written in generally understandable language and in the native language of the parents. The written notice shall be delivered in person or by certified mail.

The written notice must include an explanation of all procedural safeguards available to parents. This seems to include an explanation of the child study team, the core team and the process of appealing the placement decision. Each test or evaluation procedure to be used must be described.

Finally, parental consent must be obtained before any tests or evaluations are done on the child. If the parents refuse to consent to the tests for evaluation, then school personnel may request a hearing before an impartial hearing officer.

How is a child evaluated to determine the need for special education?

Before a child may be placed into a special education program a child study team must conduct a comprehensive assessment of the child. The areas which are to be assessed include: (1) scholastic skills; (2) physical health; and (3) social adjustment.

The purpose of the child study team is to gather all information regarding the child. After gathering the data the child study team should determine: (1) if the child is handicapped; (2) what the educational needs are; and (3) state the service options for the child.

If the child study team recommends a change in placement/program, the parents shall be notified that a change is proposed. Notice shall be written and shall include: (1) a description of the proposed change and reasons why it is the least restrictive program; (2) a description of any tests or evaluations used in making the change; (3) a statement that the school files are open to parents or their designee. Copies of records may be obtained at no more than cost of copying; and (4) a description of the hearing procedure.

The notice must be: (1) written in language understandable to the public; (2) provided in native language of parents or mode of communication used by parent; and (3) if parent's language is not a written one, the notice must be translated.

Does a parent have the right to an independent education evaluation?

Upon completion of the school's evaluation, a parent has the right to an independent evaluation paid for at public expense. The qualifications of the evaluator(s) must be the same or better than the evaluator(s) that the school employs. Also, the independent evaluator(s) must not be employees of the school.

How is an Individualized Education Program (I.E.P.) developed for a handicapped child?

After a child study team determines that the child is handicapped and in need of special education, an Individualized Educational Program (I.E.P.) is developed. The I.E.P. is to be developed in a meeting with a special education supervisor, classroom teacher, special education teacher, parents, and, if appropriate, the child.

The I.E.P. shall include: (1) statement on present level of performance; (2) statement of annual goals; (3) short-term goals; (4) type of service to be provided and extent that child can participate in regular program; (5) projected date for beginning services and length of service; (6) how and how often program shall be evaluated (program must be evaluated annually); and (7) for high school students, what should be focus of program: total skills, live skills, or vocational training.

After a completion of the I.E.P., the parents must give their written permission that I.E.P. is to be followed. Before an I.E.P. is developed, parents may consent to a temporary placement upon the recommendation of the child study team. This may up to six (6) weeks.

How are subsequent changes in program completed?

If a child is in special education, then any changes in program are only possible if a meeting to develop a new I.E.P. is held.

How are annual reviews of I.E.P. completed?

A new I.E.P. shall be established or the present I.E.P. revised before the beginning of the school year. The parents shall have the opportunity to assist in scheduling the meeting where the revision shall take place.

How may a parent challenge the provision of special education services to a child?

Parents and school officials may disagree over any aspect of the provision of special education to their child. In that case, they are entitled to a hearing before an impartial hearing officer. A hearing request should be made in writing to the Chairperson of the Board of Trustees.

The hearing officer for this hearing is the County Superintendent of schools. The County Superintendent may be disqualified if s/he has a personal or professional interest in the case. At the hearing, a transcript must be made. The parent is entitled to be represented by an attorney. Also, a parent may present evidence and confront and cross-examine witnesses presented by the school district.

Within forty-five (45) days of the request for a hearing, a written decision must be made. After the parents receive the decision, they have fifteen (15) days to appeal an adverse decision to the State Superintendent.

At this time, the final decision upon appeal is made by the State Superintendent of Public Instruction. That provision of the regulation violates Public Law 94-142 because no employee of an agency involved in the education of the child may be the hearing officer in special education due process hearings.

The appeal is a review of the first hearing. New evidence may be introduced upon request of a party. A decision must be made within thirty (30) days of the receipt of the appeal. If a parent is aggrieved by the decision upon appeal, s/he may bring a court action in Federal or State District Court.

During the pendency of this process, the child must remain in his/her current educational placement. If the question is one of initial admission to a public school program, then the child must be admitted to that program.

C. ACCESS TO AND CONFIDENTIALITY OF SCHOOL RECORDS

Do parents have access to school records of their child?

The parents of a student attending a school have access to all school records of their child. The parents may name a representative (for example, an attorney), to have access to the records. When the student reaches eighteen (18) years of age or is attending a post-secondary school, then only the student has access to the school records.

In this material only the term "parents" is used to describe the party who has the right of access. If the student is over 18 or attends a post-secondary school, then the student is the party who has the right described.

Parents have access to their child's school records. This means that they may inspect and review all school records on their child. If their child's records are on documents with records of other children, the parents have the right to see the part of the document which applies to their child.

The right of access includes other rights. Upon the parents' request, school officials must provide an explanation or interpretation of the records. Further, a copy of the school records must be provided if the failure to provide a copy effectively prevents the parents from exercising the right to access. The school may charge a reasonable fee for copying although it may not charge for the labor needed to retrieve the records.

Unless the school district has a written policy on requests for records, the request to see the records should be made to the superintendent of schools. The requst should be written. Within a reasonable time, but no later than forty-five (45) days, the parents shall be allowed to see the record.

May a parent challenge the content of school records?

When the parents read the school record they may find parts of it inaccurate, misleading or otherwise violating the right of privacy. In that case, the parents should ask the school to change the record. If the school refuses to change the record, then the school must inform the parents of their right to a hearing.

The parents may request a hearing to challenge the content of the school records. Unless written policies of the school district provide otherwise, the request should be made to the superintendent of schools. The hearing shall be held within a reasonable time of the request and the parents shall be given notice of the date, time and place of the hearing. The hearing may be held before any person who does not have a direct interest in the outcome. Parents may present evidence and be assisted by others at his own expense. Based only upon the evidence presented at the hearing, the hearing officer shall make a decision within a reasonable time.

If the records are changed as a result of the hearing, then the parents shall be informed of the change in writing. If the school refuses to change the record, then the parents may insert a statement in the records regarding the alleged inaccurate record. The parents' statement must be maintained in the school record.

Must school records be held in a confidential manner?

Generally, personally identifiable information in school records may not be disclosed without written permission of the parents. Certain people may see the school records without the parents' written permission. Those people include: (1) school officials determined to have a legitimate educational interest; (2) school officials of another school to which a child intends to transfer; (3) certain federal officials; (4) certain information regarding financial aid to the student; (5) state and local government officials to whom information must be disclosed according to state law adopted prior to November 19, 1974.

If a school discloses any information to the persons listed above, then a record of the disclosures must be kept. The record must contain the names of the persons to whom the record was disclosed and the legitimate interests the persons had in requesting them. The record of disclosure must be available for inspection by the parents.

If a school seeks parental permission to disclose certain information, the written permission must state certain items. It must specify the records to be disclosed, the purpose of the disclosure, and to whom the records will be disclosed.

When school records are disclosed the party receiving the records may not redisclose the information obtained unless parental permission is obtained.

Certain "directory information" may be disclosed without permission from the parents. It includes the student's name, address, telephone number, date and place of birth, major field of study, school activities, dates of attendance, degrees, most recent previous school attended and other similar information.

Nevertheless, before disclosing directory information the school must give public notice of the types of information said to be directory information, the right of parents not to have directly information listed and the period of time that parents have to inform the school not to disclose the directory information.

In addition to the administrative regulations of the Montana Office of Public Instruction and the United States Department of Health, Education and Welfare (both described above), the Montana State Constitution guarantees the right to privacy, Section 10, Article II, 1972 Constitution of Montana. Under that section a private action for damages could be maintained against school officials violating the privacy of a student.

When are school records destroyed?

Schools may not destroy special education records until five (5) years after the student reaches his/her twenty-first (21st) birthday. At that time the school must notify the parents that the records are no longer needed. The parents may require the school to destroy the records. If the parents do not require the records to be destroyed, then the school may keep them or destroy them. However, certain inforation may be kept regardless of the parents' wishes. This information includes the student's name, address, grades, attendance records, classes attended and grade level completed.

Schools must notify parents when special education records are no longer needed to educate a child. At that time the parents may require the school to destroy the records.

What is meant by school records?

Throughout this material, the term "school records" is used. The term includes all records directly related to a student and which are maintained by the school or by another party for the school. There are some records which are not school records to which a parent has the right of access. They include: (1) teaching and administrative personnel records solely in possession of maker and only revealed to a substitute; (2) employment records of a student employed by the school unless the student is employed because he or she is a student. Other records specifically excluded are records relating to post-secondary students.

What is meant by competence?

Competence or sound mind (or conversely, unsound mind) is a legal concept, not a psychological concept. Whether a person has the competence to perform a particular act depends under the act. There is no line which can be drawn where a person is competent to do everything or competent to do nothing. The question that will be asked is whether the person has the competence to perform the particular act in question.

There are many definitions of unsound mind. The basic definition of unsound mind is a person's mind is so affected as to make him/her unable to understand the nature and consequences of his/her acts. Another way of saying it is if a person does not understand the legal rights and liabilities of an act. The person's statements and actions at or about the time of the act in question will be used to determine if the person was competent to perform the act.

The fact that a person is developmentally disabled does not necessarily mean the person is incompetent. The question is whether the person is able to understand the nature and consequences of his/her acts. The developmental disability may result in a person being unable to understand the consequences of his/her acts.

Does a developmentally disabled person have the right to marry?

Persons who are developmentally disabled have the same right to marry as any other person. Marriage is considered to be a fundamental right. "Marriage is one of the 'basic civil rights of man', fundamental to our very existence and survival". *Loving v. Virginia*, 388 U.S. a (1967). As a fundamental right the state must have a compelling interest to limit it.

In Montana, no laws prohibit a person with a developmental disability from marrying. Nevertheless, a person married to a person with a developmental disability may invalidate the marriage. A marriage may be invalidated if one party lacked the capacity to consent to the marriage at the time the marriage was entered into.

A person who has a guardian or conservator may be able to consent to a marriage. The validity of that marriage would be based upon whether or not the person lacked the capacity to consent at the time of the marriage.

For example, the person may, for a period of time become able to consent to a marriage while legally still under a guardianship or conservatorship. The deciding factor is whether at the time of the marriage the person had the capacity to consent to the marriage.

Does the developmentally disabled person have a right to contract?

A developmentally disabled person has the same right to contract as anyone else. Specifically, the Freedom from Discrimination Act (Section 64-301, et.seq.) protects the developmentally disabled person's right to contract in the following areas: (1) Employment; (2) Public accomodation; (3) Housing; (4) Financial assistance; and (5) Credit. Physical or mental handicap cannot be considered by the person making a contract with the developmentally disabled person if the contract is in one of the five areas described above.

In addition, the person contracting with the developmentally disabled person can usually require the disabled person to fulfill his/her part of the contract. For example, a contract made with a person of "unsound mind" may not be rescinded if it is a contract for a necessity for the disabled person or his family. Further, a person who is "without understanding" cannot make a contract. Nevertheless, she/he is responsible for the payment for the reasonable value of things furnished to him/her necessary for support of the person or the family. The person who contracts with a developmentally disabled person of unsound mind or without understanding to provide a necessity of life is always entitled to payment.

Does the developmentally disabled person have the right to vote?

Montana statutes state the qualifications of persons entitled to vote. Further, they state, "No person adjudicated of unsound mind has the right to vote unless he/she has been restored to capacity as provided by law".

The person with a developmental disability has the same right to vote as any other person. This right is limited only if the disabled person was adjudicated to be of unsound mind. That means the person must be found by a court to have an unsound mind.

A person admitted into Boulder River School and Hospital under the Treatment of the Developmentally Disabled Act loses only those rights specifically stated by the court order admitting the person. Without a specific statement in the court order denying the right to vote, the developmentally disabled person otherwise qualified has the right to vote.

Nevertheless, a developmentally disabled person under a guardianship or conservatorship does not have the right to vote. The fact that she/he was adjudicated an incapacitated person means she/he was found to be of unsound mind. The person loses the right to vote until restored to capacity as provided by law.

May a developmentally disabled person make a will?

Any person who is 18 years of age or older and who is competent may make a will. A person is competent to make a will if (1) she/he is able to understand the property she/he has; (2) able to understand the relationship to those who would naturally be the recipient of the estate; (3) able to understand the disposition that she/he is making by the will.

Is the developmentally disabled person who has a guardian competent to make a will?

The developmentally disabled person who has a guardian may be competent to make a will. The court judgment that a person needs a guardian is evidence of lack of competence to make a will. It is not conclusive evidence that the person is not competent to make a will.

How is a developmentally disabled person's estate disposed of if she/he does not have a will?

The estate of the developmentally disabled person who dies without a will is distributed as the estate of any person who dies without a will. See the answer to the question: "How is the estate of a parent of a developmentally disabled person distributed?" under "Providing Financial and Personal Care for the Developmentally Disabled, A. Wills and Trusts".

Must training for the developmentally disabled adults be provided in the least restrictive environment?

In the Developmentally Disabled Assistance and Bill of Rights Act, Congress found that treatment, services and habilitation should be provided to the developmentally disabled in the setting which is least restrictive to the person's individual liberty. The focus should be on the needs of the habilitation plan. The plan should be developed. From that point the setting where that plan can best be implemented should be determined. The setting which is least restrictive to the person's liberty yet meets the needs of the plan should be the one into which the person is placed.

Also, time should be considered when determining the least restrictive alternative. A short time in a restrictive setting is less restrictive than a long time in a free setting to accomplish habilitation goals.

One part of the state law attempts to define the least restrictive alternative. It says that to fulfill the goal of the least restrictive environment a facility should be trying to move the person from:

a. A more to less structured living situation.

b. Larger to smaller facilities.

c. Larger to smaller living units.

d. Group to individual residences.

e. Segregated from the community to integrated with the community.

f. Dependent to independent living.

The above six points are a helpful guide to defining the least restrictive setting for a person.

What records must be kept confidential and when is the person's consent required?

The developmentally disabled person has many records kept by various agencies regarding him/her. At times the agency keeping the records may want to release the records of a developmentally disabled person to a person not involved in the direct administration of a program. In those cases the agency must obtain consent of the person whose records are being released.

Agencies which receive funds under Title XX of the Social Security Act must maintain records confidentially. They may be disclosed only for purposes directly connected with the administration of the program. In all other cases the permission of the person or his guardian should be obtained.

The administrative rules of the Department of Social and Rehabilitation Services require that records of individuals receiving services from agencies providing services to the developmentally disabled be kept in a confidential manner.

Informed consent should be obtained before records are released. Specifically, a developmentally disabled person should have: (1) the ability to understand to what she/he is consenting; (2) actual understanding of what she/he

is doing. As to the second element a full explanation of three items should be given: (1) specifically, what records are being released; (2) to whom the records are being released; and (3) an explanation of the reason for the release. This explanation will help the developmentally disabled person to understand to what she/he is consenting.

III. STERILIZATION LAW AS IT AFFECTS THE DEVELOPMENTALLY DISABLED

May a person be sterilized without his/her consent?

No Montana statute authorizes the involuntary sterilization of any person. Formerly, Montana did have a compulsory sterilization law. It was repealed in 1969.

May a developmentally disabled person be voluntarily sterilized?

Voluntary sterilization of a developmentally disabled person is legal. The person needs to be capable of understanding the nature and consequences of his/her act and actually understand the nature and consequences of his/her act. Further, the person must voluntarily consent. Voluntary means the person must exercise his/her free will and the consent must not be coerced.

To actually understand a sterilization the person must understand the purpose and effect of the procedure. The fact that the procedure cannot be reversed must be realized. Finally, hazards in the operation must be understood.

To determine capability to consent and actual understanding of the nature and consequences of the sterilization, state law established a Board of Eugenics. If doubt existed as to a person's capacity to understand or actual understanding of the sterilization operation, then the Board of Eugenics could make the decision.

State law provides that a person or someone for a person apply to the Board of Eugenics. The Board would decide if sterilization was in the best interests of the person and the state. Further, it would decide whether a person had the capability to consent and actually did consent. Finally, parents or guardians would have to consent, also.

After the hearing the Board could find that the person was not capable of consenting to a sterilization. In that case the person could not be sterilized. Only if the person had the capacity to consent to a sterilization could the sterilization be done.

The Board of Eugenics does not exist any longer. The procedure that it was to follow is still in state Law. Therefore, before a person can be sterilized, she/he must

be capable of understanding the nature and consequences of the act and actually understand the nature and consequences of the act. Nevertheless, some helpful guidelines are suggested by the state law.

A person under a guardianship may be able to be sterilized. The person must be capable of understanding the nature and consequences of the sterilization and actually understand the nature and consequences of the sterilization. Nevertheless, a guardian may not consent to the ward being sterilized without the consent of the ward. The ward's consent is an absolute necessity.

Persons involuntarily institutionalized in Warm Springs State Hospital or Boulder River School and Hospital may be able to consent to sterilization. Such persons lose only those rights specifically stated in the court order. Unless the court order states that the person may not consent to a sterilization operation, then the person may consent to a sterilization. That person must still have the ability to understand the nature and consequences and have actual understanding of the nature and consequences of the sterilization.

IV. PROVIDING FINANCIAL AND PERSONAL CARE FOR THE DEVELOPMENTALLY DISABLED

A. WILLS AND TRUSTS

What is a will?

A will is a legal declaration of a person's intentions regarding the distribution of his/her property, the guardianship of his/her children, and the administration of his/her estate. Montana law requires a will to be in writing.

What is a trust?

A trust is a legal relationship where one party holds the title to certain property for the benefit of a second party. Generally, trusts are established to secure tax benefits. Also, proper management of property may be assured by giving the property to a person which business experience in trust for another who lacks that experience. A trust is considered an asset of the person for whose benefit the property is held.

What are the purposes for estate planning?

The usual purposes of estate planning are to minimize taxes and to provide for a sensible distribution of the estate. For parents of disabled children there is an additional purpose. That is, to assure that no government benefits are lost because of property or funds which a developmentally disabled child inherits. If a disabled person has a certain amount of assets, she/he is not eligible for some government programs.

How is the estate of a parent of a developmentally disabled person distributed?

If the parent has a will, then the estate is distributed according to the will. If the parent does not have a will, then the estate is distributed according to the laws of Montana. The laws on Montana say the estate is to be distributed as follows:

(1) If the deceased has no children or all surviving children are children of the surviving spouse, then the entire estate to the surviving spouse;

(2) If there are surviving children, one of whom is not the child of the surviving spouse, then one-half of the estate to the surviving spouse and one-half of the estate to that child;

(3) If there are surviving children more than one of whom is not the child of the surviving spouse, then tw-thirds of the estate is divided equally between those children and one-third to the surviving spouse;

(4) If there is no surviving spouse, then equally among the living children;

(5) If there are no surviving children, then to the parents of the deceased equally;

(6) If there are no surviving children or parents, then to the brothers and sisters of the deceased equally. If a brother or sister is deceased, then his/her share is divided equally amonger his/her children;

(7) If there are none of the above, then to the next of kin.

How is a guardian for a disabled minor child appointed?

The parents may appoint a guardian of an unmarried minor by will. This appointment is effective unless:

(1) The person named refuses to accept the guardian-ship; or

(2) The child is 14 years of age or older and objects. If #2 occurs, then the court holds a hearing but may appoint the named guardian. If the parents do not appoint a guardian, then the court may appoint a guardian based on the best interests of the child.

How is a guardian for a developmentally disabled adult appointed?

Parents or the spouse of an adult in need of a guardian may name a guardian in their will. The named person must give notice of his acceptance of the appointment. The appointment is effective unless the person under the guardian-ship (ward) objects.

If the ward objects, then guardianship proceedings may be instituted. State law establishes a priority system for persons to be appointed guardian of an adult. The priority is as follows:

(1) Spouse of the alleged ward;

(2) Adult child of the alleged ward;

(3) Parent of the alleged ward or someone named in the will or other writing signed by the parent;

(4) Any relative of the alleged ward with whom the person has resided for the past six months;

(5) Person named by the person who is caring for the alleged ward or paying benefits to him. This is the same priority for naming a guardian if the parent of the alleged ward is living.

How is a conservator named for a minor?

The court will appoint a conservator if one is needed upon petition to the court. Montana statutes provide a priority system for who is to be appointed the conservator of a protected person. It is as follows:

(1) If a conservator is appointed where the protected person lives, then that person;

(2) A party named by the protected person if the protected person is fourteen or older and has sufficient mental capacity to make an intelligent choice;

(3) Spouse of a protected person;

(4) An adult child of a protected person;

(5) Parent of the protected person or person nominated by the will of the parents;

(6) Relative of the protected person with whom the protected person has lived for six months;

(7) Person named by the person taking care of the protected person or paying benefits to him/her. A court may pass over a person with priority only for good cause.

How is a conservator appointed for an adult?

The same priority system described above is used to appoint a conservator for an adult.

B. GUARDIANS, CONSERVATORS AND RESPONSIBLE PERSONS

Under what circumstances is a guardian appointed?

A guardian is appointed for a minor (person under 18 years of age) if all parental rights of custody have been terminated or suspended by circumstances. A guardian is appointed for an adult if the person is impaired by reason of mental illness, mental deficiency, physical illness or

disability, advanced age, chronic use of drugs, chronic intoxication or other cause to the degree that he cannot make or communicate responsible decisions concern himself or the cause has so impaired his judgment that he is not capable of realizing and making a rational decision regarding his need for treatment.

What powers and duties does a guardian have?

The guardian of a minor or an incapacitated person has the same powers and duties as a parent over a minor child except: (1) the guardian is not obligated to provide for the ward from the guardian's own funds; (2) the guardian is not liable by reason of the guardianship for acts of the ward. Specifically, the guardian must take reasonable care of the ward's personal effects and begin conservatorship proceedings if needed; (3) the guardian may receive money payable for the support of the ward and apply them to the ward's current needs. Excess funds must be conserved for the ward's future needs and if the ward has a conservator the excess funds must be turned over at least annually. Money received is not to be used for compensation to the guardian unless approved by the court order or determined by a conservator; (4) the guardian may facilitate the ward's education or other activities or authorize medical or other professional care. The guardian is not liable by reason of consenting for injury to the ward resulting from negligence or acts of third persons unless parental consent would have been illegal; (5) the guardian of a minor may consent to the ward's adoption or marriage.

The above specific circumstances are not meant to be a limit on the power or duty of a guardian.

May a temporary guardian be appointed?

If necessary, a temporary guardian may be appointed for a minor or an incapacitated person. The temporary guardian has the same status as an ordinary guardian. The authority of a temporary guardian may not last for more than six (6) months.

When does the authority of a guardian end?

The authority of a guardian ends upon the death of the guardian or ward, the determination that the guardian is incapacitated or upon removal or resignation of the guardian. A guardian may be removed if the court determines that the person is no longer incapacitated or that removal is in the best interests of the ward. Also, the guardian of a minor ends when the minor turns eighteen (18) years of age.

Under what circumstances is a conservator appointed?

A conservator may be appointed for a minor if (1) the

minor has money or property that requires management or protection which cannot otherwise be provided; or (2) the minor has business affairs which may be jeopardized or prevented because she/he is a minor; or (3) funds are needed for his support or education and a conservatorship is necessary to obtain funds. A conservator may be appointed for any person if (1) a person is unable to manage his/her property and affairs effectively for reasons such as mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power or disappearance; and (2) the person has property which will be lost unless proper management is provided or funds are needed for the support of the person or of persons entitled to be supported by him and a conservatorship is needed to provide funds.

What powers and duties does a conservator have?

A conservator has the authority to manage the estate of the protected person. He must manage the property as would a prudent person who is managing property with a view to protecting the principal and producing income. A transaction between the conservator acting for the estate of the protected person and the conservator acting for himself may be voided unless the court approves it.

When does the authority of a conservator end?

The authority of a conservator ends when the court finds that the minority or disability or the protected person has ceased. The protected person, personal representative, conservator or other interested person may petition the court to make such a finding.

When is a responsible person appointed?

A responsible person may be appointed by the court in any proceeding under the Treatment of Developmentally Disabled Act (Title 38, Chapter 12, R.C.M. 1947) or the Treatment of the Seriously Mentally Ill Act (Title 38, Chapter 13, R.C.M. 1947). The Treatment of the Developmentally Disabled Act is the law authorizing treatment at Boulder River School and Hospital. The Treatment of the Seriously Mentally Ill Act authorizes treatment at Warm Springs State Hospital.

A responsible person may be appointed under the Treatment of the Developmentally Disabled Act if (1) the court believes that a conflict of interest may exist between a developmentally disabled person and his/her parents or guardian; or (2) the parents or guardian are unable to protect the interests of the developmentally disabled person; or (3) if there is no parent or guardian.

The Treatment of the Seriously Mentally Ill Act does not require any of the three conditions stated above to exist before a responsible person may be named. For a person being treated at Warm Springs State Hospital a responsible person may be named at any time.

What are the powers and duties of a responsible person?

A responsible person's statutory duties are very vague. She/he is to "assume responsibility for a person who is developmentally disabled or alleged to be developmentally disabled". The specifically stated powers and duties of a responsible person for a resident of Boulder River School and Hospital include: (1) being a party to the hearing on whether the developmentally disabled person should be involuntarily treated; (2) having access to the records of the institution on the resident; (3) being notified of and giving consent to hazardous treatment, behavior modification programs involving noxious or aversive stimuli, or experimental research, and (4) being a party to the hearing on release of the person from the institution.

The powers and duties of a responsible person of a resident of Warm Springs State Hospital include: (1) being a party to the hearing on whether the person should be involuntarily treated; (2) giving consent to unusual or hazardous treatment (including lobotomies and adversive reinforcement condition); (3) being a party to the hearing on whether the person's involuntary treatment should be extended.

How is a responsible person appointed:

A responsible person is appointed in a proceeding involving the involuntary treatment of a person at Boulder River School and Hospital or at Warm Springs State Hospital. The county attorney may suggest names of people to be responsible persons upon bringing the petition to institutionalize the developmentally disabled person.

C. FOSTER CARE

What is foster care?

Foster care is provided by a person who operates a home or institution in which she/he cares for and maintains a child or children or an aged or disabled adult for which she/he receives payments. The child may not be a blood relative or a ward.

Who may provide foster care?

Any person who is licensed by the Montana Department of Social and Rehabilitation Services (SRS) may provide foster care. No fee may be charged by SRS to issue a license. If a person operates a foster home without a license, then the person may be convicted of a misdemeanor and fined up to $100.00.

How may a person become licensed to provide foster care?

Any person may apply to SRS to become a foster parent. Two types of foster care licenses may be issued for children's foster homes:

1. Foster family home for homes which would have one to six children;

2. Group foster homes for seven to twelve children.

Foster homes for aged or adult persons may house up to three aged or disabled persons.

What are the licensing requirements for a Foster Family Home?

The foster parent(s) must complete a physician's report. The Social Worker does a study and recommends licensing. The Social Service Supervisor makes the final decision. If a license is refused or revoked, then the foster parents have the right to appeal the decision.

What are the licensing requirements for a Group Foster Home?

The requirements for a Foster Family Home must be met. In addition, a fire and health inspection of the home is required. Also, fire and public liability insurance is required.

What are the licensing requirements for an Adult Foster Home?

The Adult Foster Home parents must complete a physician's report. The Social Worker does a study of the home based on the home and recommends licensing. The Social Service Supervisor makes the final decision.

Who is eligible for foster care?

Children under eighteen years of age are eligible for foster care. In addition, the child must be dependent, neglected or abused or the parents must voluntarily relinquish custody. Adults who are found to be disabled by Vocational Rehabilitation, Social Security, Railroad Retirement, Veteran's Administration, the court, or the Economic Assistance Division of SRS are eligible for adult foster care. A developmentally disabled person who fits one of these categories is eligible.

Who is a dependent child?

Dependent is defined by statute to mean the child is abandoned, dependent upon the public for support, destitute, without parent, guardian or under care of suitable adult or has no proper guidance to provide for necessary physical, emotional or moral well-being. A state district court may find that a child is dependent by petition of the county attorney.

Who is an abused or neglected child?

Abuse or neglect of a child is the commission or omission of acts which materially affect the normal physical or emotional development of a child. Any excessive physical injury, sexual assault, or failure to thrive, after considering the age and medical history of the child, shall be presumed to be non-accidental and to materially affect the development of this child. Also, the commission or omission of any acts by any person in the status of parent, guardian or custodian who by those acts refuses or with state or private aid is unable to discharge the duties for proper and necessary subsistence, education, medical or other care. A state district court may find that a child is abused or neglected by petition of the county attorney.

What types of custody may be awarded by the court after finding a child is abused, neglected or dependent?

Generally, a court may award 3 types of custody:

1. Permanent;

2. Limited; and

3. Temporary.

Permanent custody is the right and duty to have care, custody and control of the child, including the right to consent to adoption. Limited custody is the same as permanent custody but with no right to consent to adoption. Temporary custody is the same as limited but has a limit on the length of time. Custody of the child may be voluntarily relinquished by the parents for a period of time.

Who may obtain custody of a child?

A court may award custody to:

1. SRS

2. A licensed child-placing agency

3. A relative or other individual.

May a foster parent consent to the educational evaluation, placement and program of a child?

The school district and the Montana Superintendent of Public Instruction are required to appoint a surrogate parent when no parent can be identified, the agency cannot discover where the parent is, or the child is a ward of the state. Therefore, if SRS had custody of a child, the schools would have to appoint a surrogate parent. The surrogate parent may not be an employee of the public agency responsible for providing an education to the child. The surrogate parent may be paid by the schools for serving

as surrogate parent.

D. SOCIAL SECURITY AND SUPPLEMENTAL SECURITY INCOME

Is a developmentally disabled person eligible for Social Security?

Eligibility for Social Security depends on the number of quarters of a year that a person has earned as designated level of income. A developmentally disabled person may earn eligibility as any other person would. Also, the spouse, widow(er) and dependent children of an eligible person are eligible to receive social security based upon the eligible person's payment into the social security trust fund. A developmentally disabled person may be eligible as a spouse, widow(er) or dependent child.

What is the procedure for determining eligibility for Social Security?

A person's eligibility is determined by application to the Social Security Administration. Written notice of the initial determination is mailed to the applicant at his last known address. An applicant may ask that the Social Security Administration reconsider. That request must be made in writing within 60 days after receipt of the written notice of initial determination. A written notice of reconsidered determination must be mailed to the applicant. A person may ask for a hearing after the reconsidered determination. The request for a hearing must be made within 60 days of receipt of the request of reconsidered determination.

Is a developmentally disabled person eligible for Supplemental Security Income?

A person is considered disabled (and therefore eligible for Supplemental Security Income) if she/he is unable to engage in any substantial gainful activity by reason of a medically determinable physical or mental impairment which is expected to last 12 or more months. To be eligible, a person's annual income must be below $1,752 and the person's resources must be below $1,500. Resources means a person's cash or assets convertible to cash. Resources do not include a person's home, household goods and personal effects, a car valued at $1,200 or less and certain other property.

What is the procedure for determining eligibility for Supplemental Security Income?

The procedure for determining eligibility is essentially the same as the procedure for determining eligibility for Social Security.

What benefits does a person receive from Supplemental Security Income?

The person is eligible to receive monthly cash payments. In addition, a person who is eligible for supplemental security income is eligible for Medicaid.

What is a representative payee?

A representative payee is a person who receives payment of Supplemental Security Income or Social Security for another person. The representative payee is to use the Supplemental Security Income or Social Security only for the use and benefit of the person receiving such income.

When is a representative payee appointed?

A representative payee is appointed when it appears to the Social Security Administration that the interests of the recipient would be served by the appointment of a representative payee. Also, in the case of Supplemental Security Income, if a disabled person is medically certified as a drug addict or alcoholic, then a representative payee must be appointed.

How is a representative payee appointed?

A recipient may apply to the Social Security Administration that a particular person be named representative payee. If the Administration refuses to appoint one, the decision may be appealed in the same way as eligibility is appealed.

V. THE DEVELOPMENTALLY DISABLED PERSON'S RIGHT TO BE A MEMBER OF THE COMMUNITY

A. FREEDOM FROM DISCRIMINATION

Does Montana law prohibit discrimination because of developmental disability?

The Montana Freedom from Discrimination Act (Title 64, Chapter 3, Revised Codes of Montana, 1947) prohibits discrimination by reason of mental or physical handicap. Developmental disabilities could be included within the meaning of mental handicap or physical handicap.

Mental handicap is a mental disability which results in subaverage intellectual functioning or impaired social competence. Physical handicap is a physical disability, infirmity, malformation or disfigurement caused by bodily injury, birth defect or injury. Epilepsy is specifically stated to be a physical handicap.

What types of Discrimination does Montana law Prohibit?

Montana law prohibits discrimination in employment, public accomodations, housing, finance, state and local government services, education and credit. Decisions based on mental or physical handicap in these areas are prohibited.

What is discrimination in employment?

All aspects of the employer-employee relationship are included. An employer may not refuse to hire or promote a person because of handicap. Neither may the employer pay more or less because of handicap. Also, labor organizations may not discriminate by handicap.

What is public accomodation?

It is a place which offers services, goods or facilities to the general public. It includes inns, restaurants, eating houses, hotels, motels, soda fountains, soft drink parlors, taversn, night clubs, trailer parks, resorts, campgrounds, barbershops, beauty parlors, bathrooms, swimming pools, skating rinks, golf courses, cafes, transportation companies and hospitals. Such places may not discriminate by mental or physical handicap.

What activities are prohibited in discrimination in housing?

One may not refuse to sell, lease or rent housing or improved or unimproved property to another because of mental or physical handicap. Also, no distinction based on mental

or physical handicap may be made on any term, condition or privilege relating to the use, sale, lease or rental of housing.

What is discrimination in finance?

Discrimination in finance includes discrimination by a bank, trust company, finance company, savings and loan company, or insurance company. If a person applies for finacial assistance from one of those institutions, the person may not be discriminated against by mental or physical handicap.

What are state and local government services?

Any program of state or local government is a service. No program may be refused to, withheld from or denied to a person because of mental or physical handicap.

What is discrimination in credit?

Credit is the right granted to a person to defer payment of a debt, to incur debt and defer payment or to defer payment for property or services. Such transactions may not be limited because of mental or physical handicap.

Are there any exceptions which are allowed?

Discrimination by mental or physical handicap is legal if based upon "reasonable grounds". That is to be strictly construed. Essentially, discrimination would be allowed if it was necessary.

What does one do if discriminated against by mental or physical handicap?

A person should file a complaint with the Human Rights Commission, State of Montana, 404 Power Block, Helena, Montana (449-2884). The complaint must be filed within 180 days of the date of the occurrence of the discrimination or of the date the discrimination was discovered.

Does federal law prohibit discrimination by handicap?

Companies which contract with the federal government to provide services in an amount over $2,500.00 may not discriminate by handicap in hiring to fulfill the contract. Hanciapped persons who are qualified must be treated the same as others in employment to fulfill such contracts. To be qualified a handicapped person must be able to perform the essential functions of a particular job.

Also, discrimination by handicap by any agency which receives financial assistance from the federal government is prohibited. The handicapped person may not be excluded from, denied the benefits of, or subjected to discrimination under any such program. This prohibition against discrim-

ination by handicap includes discrimination in employment and the service provided by the agency.

What should a person do if she/he has been discriminated against by handicap in a program as described above?

If a person has been discriminated against in employment by a federal contractor the complaint should be filed with:

Department of Labor
Office of Federal Contract Compliance
Washington, D.C. 20210

If a person has been discriminated against by a program which recieves federal assistance, then the person should file a complaint with:

Office of New Programs
Office of Civil Rights
U.S. Dept. of Health, Education
and Welfare
Washington, D.C. 20201
(202) 254-1821

B. ACCESSIBILITY OF BUILDINGS

Must buildings which are constructed with federal funds for state and local educational programs be accessible to the physically handicapped?

Buildings which are constructed with federal funds for state and local educational programs must be accessible to the physically handicapped. This requirement applies to buildings constructed for elementary and high schools and colleges and universitities. The effective date was December 6, 1973.

Must buildings which house federal agencies be accessible to the physically handicapped?

Buildings which house federal agencies must be accessible to the physically handicapped. This includes buildings which are owned or leased by federal agencies. It is required by the Architectural Barriers Act of 1968, as amended, and the regulations promulgated under that Act. It was effective July 1, 1974.

Must state and local agencies which receive federal funds for non-construction purposes have physical facilities which are barrier free?

Any agency which receives federal funds for any purpose

must operate its program so that when viewed in its entirety is accessible to handicapped persons. Structural changes are not required where other methods are effective. Other methods may include reassignment of classes to accessible sites, assignment of aides, or provision of the health, welfare or service at an accessible site.

Does the State of Montana require that buildings be accessible to the physically handicapped?

Montana adopted the 1976 Edition of the Uniform Building Code. It took effect on March 1, 1975. The specifications of the Uniform Building Code requires that all buildings be accessible to the physically handicapped. The Code applies to all public buildings. A public building is any building which a state or local government maintains for the use of the public or a place where the public has a right to go and be.

Must facilities rented or leased by state or local governments to house offices be accessible to the physically handicapped?

The Montana Code of Fair Practices Act requires that all services of state and local government agencies must be performed without discrimination by physical handicap. This could be interpreted to mean that facilities rented or leased by government agencies must be accessible to the physically handicapped.

Must facilities of non-profit corporations be physically accessible?

Contracts with the State of Montana are required to contain a section which states, among other things, "... there may be no discrimination on the basis of ... physical ... handicap ... by persons performing the contract". (Section 64-319, R.C.M. 1947). This contract provision seems to prohibit a non-profit corporation from renting or leasing facilities which are not accessible to the physically handicapped.

Must public transportation systems be accessible to the physically handicapped?

If federal funds are used to purchase vehicles for a transportation system, then the vehicles must be accessible to the physically handicapped. This is required by Section 504 of the Vocational Rehabilitation Act of 1973.

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